FILED

NOV 03 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. EARNEE WINDELL SMITH, Defendant - Appellant.	No. 01-50541 D.C. No. CR-99-00024-RT-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Robert J. Timlin, District Judge, Presiding

Argued and Submitted October 10, 2003
Pasadena, California

Before: BRUNETTI, T.G. NELSON, and SILVERMAN, Circuit Judges.

Earnee Windell Smith appeals his conviction and sentence for two counts of bank robbery under 18 U.S.C. § 2113. We affirm. We have jurisdiction pursuant

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Because the facts are familiar to the parties, we do not recite them here.

We conclude that the district court did not abuse its discretion by failing to raise *sua sponte* the issue of Smith's competence to stand trial. Smith's motions before the court, although unusual, did not necessitate an examination of his competency.[1]

The district court correctly determined that Smith knowingly and intelligently waived his right to counsel for pretrial and sentencing proceedings.[2] Smith appropriately responded to questions posed by the district court at two *Faretta* hearings, demonstrating a sufficient awareness of "the three elements of self-representation: (1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation."[3] Neither did the district court's decision to allow Smith's self-representation violate his

---

[1] *See*, *Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162 (1975); *Odle v. Woodford*, 238 F.3d 1084 (9th Cir. 2001) (demonstrating that greater evidence of incompetency is necessary to trigger the requirement of a competency hearing).

[2] Whether the defendant knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which this court reviews *de novo*. *United States v. Springer*, 51 F.3d 861, 864 (9th Cir. 1995).

[3] *United States v. Lopez-Osuna*, 242 F.3d 1191, 1199 (9th Cir. 2000) (internal quotation marks omitted).

Fifth Amendment right to a fair trial. To hold otherwise would contravene the intentions of the Supreme Court in *Faretta v. California*.[4]

Finally, we conclude that the sentence imposed on Smith by the district court did not involve "double-counting."[5] Smith's sentence was properly calculated according to his status as a career criminal[6] and thus did not take into account the two-level enhancement of which he complains.[7]

AFFIRMED.

---

[4] 422 U.S. 806, 834 (1975) (stating that "although [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970)).

[5] We review the district court's interpretation of the sentencing guidelines *de novo*. *United States v. Williams*, 291 F.3d 1180, 1191 (9th Cir. 2002).

[6] U.S. Sentencing Guidelines Manual § 4B1.1(b) (2001).

[7] U.S. Sentencing Guidelines Manual § 2B3.1(b)(1) (2001).